

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.L., Appellant**

**and**

**U.S. POSTAL SERVICE, MOUNTAIN VIEW  
POST OFFICE, Mountain View, CA, Employer**

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**Docket No. 21-0523**

**Issued: January 26, 2022**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 18, 2021 appellant filed a timely appeal from a February 11, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) under OWCP File No. xxxxxx429. The most recent merit decision was a decision of the Board dated October 22, 2012, which became final after 30 days of issuance, and is not subject to further review. As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's November 16, 2020 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board on different issues.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On August 24, 1992 appellant, a letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained an injury when her left knee struck the bumper of her postal vehicle while in the performance of duty. OWCP accepted her claim for left knee strain under OWCP File No. xxxxxx724. It later expanded the acceptance of the claim to include right hip contusion and lumbosacral strain. OWCP granted appellant a schedule award on September 2, 1998 for five percent permanent impairment of the left lower extremity and four percent permanent impairment of her right lower extremity, resulting from her accepted lumbar condition. In the last merit decision of record the Board, by decision dated September 8, 2011, affirmed OWCP's May 28 and August 25, 2010 decisions denying appellant's claims for a recurrence of disability beginning May 7, 2001 and November 14, 2008.<sup>3</sup> On October 12, 2017 appellant requested reconsideration. By decision dated May 2, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. By decision dated January 17, 2020, the Board affirmed OWCP's May 2, 2018 decision.<sup>4</sup>

On May 31, 1994 appellant filed a claim for traumatic injury (Form CA-1) alleging that on that date she sustained injury to her upper chest and back in the performance of duty while "pulling down her route." OWCP assigned File No. xxxxxx429 and accepted this claim for right shoulder strain, cervical strain and right shoulder impingement. It paid appellant wage-loss compensation on the supplemental rolls from August 13 to 22, 2000. By decision dated December 15, 2009, OWCP terminated appellant's compensation benefits. By decision dated August 17, 2011, an OWCP hearing representative affirmed the termination of appellant's compensation benefits. Appellant requested reconsideration on September 2, 2011. On October 7, 2011 OWCP denied appellant's request for reconsideration under the clear evidence of error standard of review. On

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<sup>2</sup> Under OWCP File No. xxxxxx429, the Board has issued the following decisions and orders: Docket No. 12-640 (issued October 22, 2012), *denying petition for recon.*; Docket No. 12-640 (issued March 14, 2013); Docket No. 10-318 (issued September 8, 2010); Docket No. 08-1843 (issued June 15, 2009); *Order Remanding Case*, Docket No. 06-1211 (issued January 31, 2007); Docket No. 05-1905 (issued March 6, 2006). Under OWCP File No. xxxxxx724, the Board has issued the following decisions and orders: Docket No. 18-1112 (issued January 17, 2020); Docket No. 11-294 (issued September 8, 2011); Docket No. 09-1549 (issued February 23, 2010); *Order Dismissing Appeal*, Docket No. 09-1637 (issued November 23, 2009); *Order Dismissing Appeal*, Docket No. 05-1915 (issued March 7, 2006), *denying petition for recon.*, Docket No. 05-1915 (issued November 30, 2006). Under OWCP File No. xxxxxx666, the Board has issued the following decisions and orders: *Order Dismissing Appeal*, Docket No. 18-0437 (issued July 6, 2018); Docket No. 12-1485 (issued February 5, 2013), *denying petition for recon.*, Docket No. 12-1485 (issued July 10, 2013); Docket No. 10-2298 (issued May 13, 2011); Docket No. 08-1873 (issued January 29, 2009).

<sup>3</sup> Docket No. 11-294 (issued September 8, 2011).

<sup>4</sup> Docket No. 18-1112 (issued January 17, 2020).

January 27, 2012 appellant appealed to the Board. By decision dated October 22, 2012, the Board affirmed the termination of appellant's compensation benefits.<sup>5</sup>

On June 25, 2007 appellant filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury in the performance of duty on June 22, 2007 while sitting at her desk and working on her computer. She explained that she turned to the right to use the telephone and her neck "snapped," resulting in pain in neck and right arm. OWCP assigned File No. xxxxxx666. After development of the claim, the Board on February 5, 2013 affirmed OWCP's May 7, 2012 decision, finding that the medical evidence of record did not establish that appellant sustained an injury in the performance of duty on June 22, 2007.<sup>6</sup>

On April 3, 2008 appellant filed a claim for occupational disease (Form CA-2), alleging that she sustained aggravation of a preexisting condition resulting in pain in the neck, right arm, and right shoulder as a result of sitting at her desk and developing a muscle spasm, turning to the right, and feeling her neck "pop." She then alleged that this incident forced a change of duty assignment. Appellant first became aware of the condition on May 31, 1994 and of its relationship to her federal employment on June 22, 2007. OWCP assigned File No. xxxxxx390. In the last merit review of this claim, by decision dated May 28, 2008, it found that appellant had not established that she sustained an injury in the performance of duty.

On November 16, 2020 appellant requested reinstatement of her wage-loss compensation and medical benefits under OWCP File No. xxxxxx429. She also requested reconsideration from OWCP's decision dated May 7, 2012 in OWCP File No. xxxxxx666, and requested further review of her March 28, 2005 request for reconsideration as well as a purported denial of her request for reconsideration dated December 27, 2017. Appellant argued that OWCP erred in inclusion of right shoulder impingement as a residual and accepted injury; erred not to conduct a merit review of a March 28, 2005 request for reconsideration; erred in not referring her to a district medical adviser for a schedule award decision dated July 28, 1999; erred in not having followed vocational rehabilitation re-employment procedures; and erred in termination of medical benefits and compensation based on total disability. She submitted an addendum to her initial reconsideration request on November 19, 2020, arguing that OWCP had ignored medical and employment evidentiary documents, failed to administer a loss of wage-earning capacity (LWEC) determination after being deemed permanently partially disabled, and failed to administer permanent impairment status in protection of her rights. Appellant submitted a second addendum to her request on December 10, 2020 in which she argued that OWCP had committed abuse of discretion. She submitted a third addendum to her request on December 18, 2020 in which she further argued that OWCP had committed abuse of discretion with regard to termination of her wage-loss compensation and medical benefits, direction to file a claim for recurrence (Form CA-2a), and reporting of injuries under both OWCP File Nos. xxxxxx429 and xxxxxx724. Appellant submitted a fourth addendum to her request on December 19, 2020 in which she alleged fraud in several 2007 medical reports. She submitted a fifth addendum to her request on December 22, 2020 in which she argued that a May 7, 2012 decision and purported denial of a December 27, 2012 was in error as OWCP erred in finding that an August 2008 permanent limited-duty job offer

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<sup>5</sup> Docket No. 12-640, *supra* note 2.

<sup>6</sup> Docket No. 12-1485, *supra* note 2.

was not found suitable. On February 1, 2021 appellant requested a status update regarding a schedule award claim filed on July 8, 1999. With her request for reconsideration, she submitted: correspondence dated from 1995 through 2009; a notification of personnel action (Standard Form (SF)-50) dated August 29, 1995; medical documents dated from 1996 through 2007; correspondence regarding job offers dated October 30, 1996, January 22, 1997, and October 25, 2002; a union interview regarding grievance dated November 17, 2008; and a report of investigation by the inspector general of the employing establishment dated May 23, 2007.

By decision dated February 11, 2021, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error. It stated, "We did consider your request under 20 C.F.R. § 10.607(b) to determine whether you presented clear evidence that the Office's last merit decision was incorrect[...] You did not present clear evidence of error. Therefore, your request for reconsideration is denied because it was not received within the one-year limit."

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>7</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).<sup>9</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>10</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.<sup>11</sup> If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>12</sup>

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<sup>7</sup> 5 U.S.C. § 8128(a); *see M.E.*, Docket No. 18-1497 (issued March 1, 2019); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>10</sup> *See M.E.*, *supra* note 7; *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>11</sup> *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>12</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also id.* at § 10.607(b); *supra* note 9 at Chapter 2.1602.5 (February 2016).

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>14</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>17</sup> To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>18</sup>

OWCP's procedures provide that the term clear evidence of error is intended to represent a difficult standard.<sup>19</sup> The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>20</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>21</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's November 16, 2020 request for reconsideration was untimely filed.

OWCP's regulations<sup>22</sup> and procedures<sup>23</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to

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<sup>13</sup> A.A., Docket No. 19-1219 (issued December 10, 2019); J.F., Docket No. 18-1802 (issued May 20, 2019); J.D., Docket No. 16-1767 (issued January 12, 2017); see *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> *Id.*; see also *Leona N. Travis*, 43 ECAB 227 (1999).

<sup>15</sup> J.F., *supra* note 13; *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> J.F., *supra* note 13; *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>19</sup> F.B., Docket No. 20-0910 (issued April 23, 2021).

<sup>20</sup> P.H., Docket No. 19-1354 (issued March 13, 2020); J.S., Docket No. 16-1240 (issued December 1, 2016); *supra* note 9 at Chapter 2.1602.5(a) (February 2016).

<sup>21</sup> See M.E., *supra* note 7; D.S., Docket No. 17-0407 (issued May 24, 2017).

<sup>22</sup> 20 C.F.R. § 10.607(a); see J.W., Docket No. 18-0703 (issued November 14, 2018); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>23</sup> *Supra* note 9 at Chapter 2.1602.4 (February 2016); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>24</sup> The most recent merit decision under OWCP File No. xxxxxx429 was the Board's October 22, 2012 decision. As appellant's request for reconsideration was received on November 16, 2020, more than one year after the October 22, 2012 merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in its October 22, 2012 decision.<sup>25</sup>

The Board further finds, however, that the case is not in posture for decision as to whether appellant's November 16, 2020 reconsideration request demonstrated clear evidence of error.

OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.<sup>26</sup> Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.<sup>27</sup> Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.<sup>28</sup> As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.<sup>29</sup>

In denying appellant's untimely reconsideration request, OWCP failed to analyze whether it was sufficient to demonstrate clear evidence of error. The February 11, 2021 decision simply noted: "We did consider your request under 20 C.F.R. § 10.607(b) to determine whether you presented clear evidence that the Office's last merit decision was incorrect[....] You did not present clear evidence of error. Therefore your request for reconsideration is denied because it was not received within the one-year limit." However, OWCP did not address appellant's statements on reconsideration. Furthermore, it provided no discussion relative to the evidence submitted on reconsideration.<sup>30</sup>

The Board finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether she had

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<sup>24</sup> 20 C.F.R. § 10.607(b); *see A.M.*, Docket No. 20-0143 (issued October 28, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

<sup>25</sup> *Supra* note 21 at § 10.607(b); *see M.D.*, Docket No. 20-0868 (issued April 28, 2021); *M.W.*, Docket No. 17-0892 (issued May 21, 2018); *see S.M.*, Docket No. 16-0270 (issued April 26, 2016).

<sup>26</sup> *See M.D., id.*; *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607.

<sup>27</sup> 5 U.S.C. § 8124(a).

<sup>28</sup> 20 C.F.R. § 10.126.

<sup>29</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

<sup>30</sup> *See M.D., supra* note 25; *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

demonstrated clear evidence that OWCP's last merit decision was incorrect.<sup>31</sup> The Board will therefore set aside OWCP's February 11, 2021 decision and remand the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's November 16, 2020 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 11, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 26, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>31</sup> OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request demonstrates clear evidence of error on the part of OWCP. *Supra* note 9 at Chapter 2.1602.5(a) (February 2016).